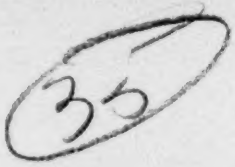

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Number 350

■

TULLY B. KILLAM

Petitioner

v.

CITY OF FLORESVILLE

Respondent

■

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

HAYDEN C. COVINGTON
Attorney for Petitioner

INDEX

Subject Index

	PAGE
Summary Statement of Matters Involved	1-10
Preliminary Statement	1
Statutory Provision Sustaining Jurisdiction ..	3
Validity of the City Ordinance and the State Statute Drawn in Question	3
Date of Judgment and Order to be Reviewed ...	4
Time and Manner in which Questions Raised Below	4
Opinions of the Courts Below	7
Statement of Facts	8
Questions Presented	10
Reasons Relied on for Allowance of Writ	11
SUPPORTING BRIEF	14-21
Specifications of Errors	14
ARGUMENT	15-21

CASES CITED

Amarillo, City of, v. Tutor 267 S. W. 697, 199 S. W. 352	5, 15
Baker, Ex parte 127 Tex. C. R. 589, 78 S. W. 2d 610, 613	6, 7, 18
Brinkerhoff-Faris T. & S. Co. v. Hill 281 U. S. 673-675, 677-682	7
Burnes v. State 75 Tex. C. R. 188, 170 S. W. 550	5, 15
Burns (Jay) Baking Co. v. Bryan 264 U. S. 504	15, 18

PAGE

Cain, Ex parte
56 Tex. C. R. 538, 120 S. W. 999 16

Calhoun, Ex parte
91 S. W. 2d 1047 16

Carter Ex parte
156 S. W. 2d 986 17

Chisholm v. Shook
Opinion of Minnesota 11th Judicial Dist. Ct., St. Louis County, January 27, 1940 18

Columbia, City of, v. Alexander
119 S. E. 241, 32 A. L. R. 746 18

Commonwealth (Pa.) v. Myers
Opinion by Centre County Court of Quarter Sessions, January 24, 1940 18

Cox, Ex parte
53 Tex. C. R. 240, 101 S. W. 369 16

De Berry v. City of La Grange
8 S. E. 2d 147 18

Faulkner, Ex parte
158 S. W. 2d 525 ..... 16, 18

George v. City of San Francisco
235 F. 757, 779 18

Gohlman v. Whittle
273 S. W. 808 ..... 5, 15

Hague v. C. I. O.
307 U. S. 496, 501, 518 ..... 11, 20

Harris, Ex parte
97 Tex. C. R. 399, 261 S. W. 1050 18

Hoffman v. State
20 S. W. 2d 1057 5

Humes v. City of Little Rock
138 F. 929 18

Jewel Tea Co. v. Town of Bel Air
172 Md. 536, 192 A. 417 18

Jewel Tea Co. v. City of Geneva
291 N. W. 644 18

PAGE

Jones, Ex parte
81 S. W. 2d 706 ..... 11, 17
Jones v. Opelika
62 S. Ct. 1231 ..... 19, 20
Largent, Ex parte
162 S. W. 2d 419 7
Lewis, Ex parte
45 Tex. C. R. 1, 73 S. W. 811 ..... 6, 17
Lewis, Ex parte
147 S. W. 2d 478 ..... 11, 17
Mato, Ex parte
19 Tex. C. R. 112 16
Maynard, Ex parte
275 S. W. 1071 18
McAlester, City of, v. Grand Union Tea Co.
98 P. 2d 924 18
McCormick v. Sheppard
86 S. W. 2d 213 16
New Jersey Good Humor, Inc. v. Board of Comm.
11 A. 2d 113, 114 18
Orangeburg v. Farmer
181 S. C. 143, 186 S. E. 785 18
Patterson, Ex parte
42 Tex. C. R. 256, 58 S. W. 1011 ..... 6, 17, 18
People of N. Y. ex rel. Bryant v. Zimmerman
278 U. S. 63, 66-69, 71 ..... 5, 15
Prior v. White
180 S. 347, 116 A. L. R. 1176 18
Real Silk Hosiery Mills v. Richmond
298 F. 126 18
Roquemore, Ex parte
131 S. W. 1101 ..... 6, 17
Schneider v. State
308 U. S. 147 ..... 2, 11, 15, 19
Shreveport v. Teague
8 S. 2d 640 18

PAGE

Slawson, Ex parte
141 S. W. 2d 609, 610 ..... 11, 17

Spelce, Ex parte
119 S. W. 2d 1033, 1037 ..... 11, 17

Walrod, Ex parte
120 P. 2d 783 19

Walsh, Ex parte
59 Tex. C. R. 409, 129 S. W. 118 16

White v. Town of Culpeper
172 Va. 630, 1 S. E. 2d 269 18

Wings v. State
98 S. W. 2d 210, 131 Tex. C. R. 188 6

Winnett, Ex parte
121 P. 2d 312 19

Yates v. Milwaukee
10 Wall. 497 18

Yee Gee v. City and County of San Francisco
235 F. 757 18

STATUTES CITED

Floresville (Texas) city ordinance 3, 10, 14

Texas Code of Criminal Procedure, 1925
Article 53 ..... 4, 6, 7, 11, 14

United States Code
Title 28, Sec. 347 (a) [Judicial Code,
Sec. 240 (a)] 3, 21

United States Constitution
Amendment I 10, 14
Amendment XIV 9-10, 14, 18

United States Supreme Court, Rules of
Rule 38, par. 5 21

Miscellaneous Citations

	PAGE
BIBLE	
Isaiah 43:10-12	8
Isaiah 61:1, 2	8
Matthew 24:14	9
McQuillen on Municipal Corporations, 2d ed. Vol. 3, p. 122	18
Texas Jurisprudence, Vol. 9, p. 469	5, 15

SUPREME COURT OF THE UNITED STATES

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TULLY B. KILLAM
Petitioner
v.
CITY OF FLORESVILLE
Respondent

■

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

To the SUPREME COURT OF THE UNITED STATES:

Tully B. Killam, petitioner, presents this his petition for writ of certiorari and shows unto the Supreme Court of the United States the following:

A

Summary Statement of Matters Involved

1. *Preliminary Statement.*

With this petition are filed two companion cases, *Daisy Largent, petitioner,* v. *Jack Reeves, City Marshal, respondent,* and *Mrs. John Hilley, petitioner,* v. *Wid Spivey, Sheriff, respondent,* brought here also from the Court of Criminal Appeals of Texas. The city ordinances under which petitioners were convicted are essentially different in their terms. The Comanche ordinance in the *Hilley* case is a license tax law. The Floresville ordinance in this case prohibits and

makes unlawful peddling of literature on the public square and on any street within the city, being a prohibitionary and not a regulatory ordinance, and does not provide for issuance of license or permit. The Paris ordinance in the *Largent* case is also prohibitionary, prohibiting the sale of literature at all times in the main business sections of the city of Paris.

There is a common question in all three companion cases: That is the arbitrary discriminatory denial of the writ of habeas corpus, contrary to the Fourteenth Amendment to the United States Constitution, and the common question of a fictitious and colorless non-federal question which is intermingled with the federal question. These common questions make it appropriate to consider these three cases together. It is here requested that the Court read and consider the petition filed in this case, with supporting brief, together with the petitions and supporting briefs filed in the two above named companion cases. Although different disposition may be made in each of the three cases, it would conserve time of the Court to consider the three together.

The ordinance here involved, as construed by the Texas courts, is identical with the ordinance involved in Numbers 13, 18 and 29, October Term 1939, in the case styled *Schneider* v. *State,* 308 U. S. 147, and the holding of the Court of Criminal Appeals that the ordinance was valid on its face contradicts directly the holding by this Court in *Schneider* v. *State,* supra.

Under the practice allowable and established by the Court of Criminal Appeals of Texas, habeas corpus cases in a conviction of this sort are reviewable by the Court of Criminal Appeals if the ordinance is unconstitutional on its face, as construed by the Texas courts. It is admittedly unconstitutional and void on its face, under the *Schneider* case, supra; therefore the purported non-federal question relied upon in the Court of Criminal Appeals in the disposition of this case is fictitious and resorted to for the

sole purpose of denying petitioner his constitutional rights, in violation of the equal protection and due process clauses of the Fourteenth Amendment.

2. *Statutory Provision Sustaining Jurisdiction.*

Section 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) sustains jurisdiction.

3. *Validity of the City Ordinance and the State Statute Drawn in Question.*

The ordinance in question is that of the City of Floresville,[1] Texas, which reads as follows:

> "AN ORDINANCE PROHIBITING THE PEDDLING AND SELLING OF MERCHANDISE WITHIN THE CORPORATE LIMITS OF THE CITY OF FLORESVILLE, TEXAS.
>
> "Be it Ordained by the City Council of the City of Floresville, Texas:
>
> "SECTION 1. That it shall hereafter be unlawful for any person to peddle any kind of merchandise, patent medicine, nostrum, on the public square or on any street within the corporate limits of the City of Floresville, Texas.
>
> "SECTION 2. Any person who shall violate any provision of this ordinance shall upon conviction be fined in a sum not less than One ($1.00) Dollar and not more than Twenty-five ($25.00) Dollars.
>
> "This ordinance to become effective from and after its final passage, and adoption and legal notice thereof given.
>
> "The fact that there is now no ordinance in the City of Floresville, Texas, prohibiting the peddling and selling of merchandise within the corporate limits of the said city, this ordinance is declared an emergency

[1] The City of Floresville is a country town in southwestern Texas, 32 miles south of San Antonio, in the truck gardening district, its population being 1,708.

and shall take effect from and after its passage and approval."

R. 6

The State statute, the validity of which is drawn in question, is Article 53 of the Code of Criminal Procedure of Texas, 1925, reading as follows:

> "The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

4. *Date of Judgment and Order to be Reviewed.*

The order remanding petitioner to custody was affirmed by judgment of the Court of Criminal Appeals entered on April 8, 1942, (R. 9) Petitioner duly filed his motion for rehearing on April 17, 1942, (R. 9) and judgment overruling the motion was duly entered on June 3, 1942. (R. 13) Time for filing petition for certiorari expires September 3, 1942. Petition is filed within such time.

5. *Time and Manner in which Questions Raised Below.*

In the application for writ of habeas corpus filed by petitioner in the County Court of Wilson County, the petitioner alleged that the ordinance in question, as construed and applied to him, was violative of his constitutional rights to worship Almighty God and of his right to carry on his "press activity" and that by virtue thereof he was illegally restrained of his liberty. R. 4.

This was sufficient under the procedure of Texas to raise the constitutional question; for if a law is unconstitutional, according to the procedure of Texas, its unconsti-

tutionality can be raised at any time without specific allegation and can be raised for the first time before the Court of Criminal Appeals on appeal.[2]

The allegation in the petition for writ of habeas corpus, that one is illegally restrained of his liberty, is sufficient, according to Texas procedure, to raise any question on argument, either in the trial court or the Court of Criminal Appeals.[2] This was a sufficient raising of the federal question under the doctrine of this Court in *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 66-69, where this Court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the *record* as a whole shows either expressly or by clear intendment that this was done the claim is to be regarded as having been adequately presented."

Please note that in the foregoing *Bryant* case the petition for writ of habeas corpus did not attack the statute as being invalid or unconstitutional but merely that the printed briefs set forth "the points to be relied upon"; the record was entirely devoid of any expressed allegation of any unconstitutionality in that case. However, in the Court of Criminal Appeals of Texas under Point One of the Propositions upon which the appeal was predicated, the ordinance is attacked as being unconstitutional. (R. 15, 16) In the *Bryant* case, supra, the New York practice did not require

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[2] *City of Amarillo* v. *Tutor,* 267 S. W. 697, 199 S. W. 352; *Hoffman* v. *State,* 20 S. W. 2d 1057; *Burnes* v. *State,* 75 Tex. Cr. Rep. 188, 170 S. W. 550; *Gohlman, etc.* v. *Whittle,* 273 S. W. 808. Texas Jur., Vol. 9, page 469.

assignments of error specifically attacking the validity of the law. It is to be noticed here that the Court of Criminal Appeals of Texas does not require assignments of error.[3]

Petitioner did not appeal to the County Court of Wilson County from the judgment of conviction rendered against him in the Corporation Court of Floresville, but, on the contrary filed his application for writ of habeas corpus with the County Court, which is proper. It is not necessary under the law of Texas where the ordinance is unconstitutional to appeal to the County Court, but an application for writ of habeas corpus can be immediately presented by the one thus convicted in the Corporation Court, which is allowed him by law as a matter of right. In such instances the Court of Criminal Appeals holds that habeas corpus is the proper remedy and it is not necessary to take an appeal from the Corporation Court to the County Court.[4]

At the hearing of the application for writ of habeas corpus in the County Court no contention was raised as to the writ of habeas corpus not being available. The right to such writ was admitted in the County Court. The writ was discharged because the County Court believed the ordinance to be constitutional and that petitioner was not denied his constitutional rights.

In the Court of Criminal Appeals petitioner contended, under Proposition 3, that habeas corpus was the proper remedy and that such court had the power to review the case by appeal, because the ordinance was unconstitutional on its face and as construed and applied. R. 15, 16.

The majority opinion of the Court of Criminal Appeals over the protest of the minority opinion, for the first time in these proceedings raised the contention that Article 53 (C. C. P. of Texas) in cases such as this, deprived the Court of Criminal Appeals of its appellate jurisdiction in habeas

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[3] *Wings* v. *State*, 98 S. W. 2d 210, 131 T. C. R. 188.

[4] See *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011; *Ex parte Roquemore*, 131 S. W. 1101; *Ex parte Baker*, 78 S. W. 2d 610; *Ex parte Lewis*, 45 Tex. C. R. 1, 73 S. W. 811.

corpus cases conferred upon it by Article 857 (C. C. P. of Texas). R. 8. See opinion in *Largent* case.

Under grounds 3 and 5 of the motion for rehearing filed in the Court of Criminal Appeals,[5] petitioner attacked the validity of Article 53 (C. C. P. of Texas) as construed and applied by that Court on the grounds that it violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, in denying the writ of habeas corpus, an inherent right guaranteed by the Fourteenth Amendment. The Court of Criminal Appeals admits that it has the duty to take original jurisdiction or appellate jurisdiction in habeas corpus cases where one is convicted under an ordinance found to be unconstitutional on its face. That court for the first time held that the power did not exist if the ordinance was unconstitutional as applied, and affirmed on this ground.* The action of the Court of Criminal Appeals is a subterfuge to deny the petitioner his constitutional rights of freedom of press and of worship of Almighty God. R. 8. See opinion in *Largent* case.

6. *Opinions of the Courts Below.*

The trial courts did not render or file opinions. The Court of Criminal Appeals' opinion and dissenting opinion of Judge Graves, are reported in 162 S. W. 2d 426. (R. 8, 9) The majority opinion and dissenting opinion in the companion case of *Ex parte Largent* are reported in 162 S. W. 2d 419. See *Largent* Record, pages 24-35.

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[5] This was timely because the Court of Criminal Appeals urged the point for the first time in the majority opinion on April 4, 1942. See *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673, 678-682.

* Compare Court of Criminal Appeals words in *Ex parte Baker*, 127 Tex. C. R. 589, 78 S. W. 2d 610, 613, to wit: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In this case the writ was sustained.

7. *Statement of Facts.*

Pertinent parts of the complaint filed in the Corporation Court under which petitioner was tried and convicted are:

> "T. B. Killam on (or about) the 31st day of May, A. D. 1941, and before the making of this complaint, in Wilson County, and State of Texas, did then and there unlawfully and wilfully peddle merchandise, to-wit: books and magazines within the corporate limits of the city of Floresville, Texas, contrary to an ordinance passed by said city on the 12th day of April, A. D., 1940."

R. 1.

The evidence showed that petitioner was an ordained minister of Jehovah God, one of Jehovah's witnesses, sent forth to preach the Gospel of God's Kingdom by means of distributing literature explaining the Bible prophecies. In the trial court he quoted Isaiah 61: 1, 2, reading as follows:

> "The Spirit of the Lord GOD is upon me; because the LORD hath anointed me to preach good tidings unto the meek: he hath sent me to bind up the broken-hearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the LORD, and the day day of vengeance of our God; to comfort all that mourn."

Isaiah 43: 10-12, as follows:

> "Ye are my witnesses, saith the LORD, and my servant whom I have chosen; that ye may know and believe me, and understand that I am he: before me there was no God formed, neither shall there be after me. I, even I, am the LORD; and beside me there is no saviour. I have declared, and have saved, and I have shewed,

> when there was no strange god among you: therefore ye are my witnesses, saith the LORD, that I am God."

and he also read to the Court Matthew 24:14:

> "And this gospel of the kingdom shall be preached in all the world for a witness unto all nations: and then shall the end come."

R. 2.

It was stipulated that petitioner was thus preaching the Gospel on the streets of Floresville at about two o'clock Saturday afternoon, May 31, 1941, at which time he was arrested and charged with a violation of the aforesaid ordinance by Ed. McDaniel, city marshal. Petitioner was taken to jail, thereafter tried in the Corporation Court, at which the above testimony was given. R. 1-3.

On June 2, 1941, in the Corporation Court judgment was entered against him, imposing a fine in the amount of $10 and costs of $29.75, or in the alternative committing him to the jail until fully paid. R. 3.

The application for writ of habeas corpus was filed in the County Court on June 2, 1941. R. 4.

Thereafter on June 2, 1941, hearing was had on the application for writ of habeas corpus and the same denied and petitioner remanded to the custody of said city marshal Ed. McDaniel. (R. 7) Notice of appeal to the Court of Criminal Appeals was duly given (R. 7) and said appeal perfected. R. 7.

The cause was duly briefed and argued in the Court of Criminal Appeals on November 17, 1941, where petitioner contended that the ordinance was unconstitutional both on its face and as construed and applied, because it discriminated against the business of selling or peddling from house to house, beyond the reach of the police power and also denying petitioner his right of freedom of press and of worship of Almighty God, all contrary to the due process

and equal protection clauses of the Fourteenth Amendment to the United States Constitution. R. 10-12, 15, 16.

The Court of Criminal Appeals wrongly held the ordinance to be constitutional on its face and refused to consider the question as to whether or not it was unconstitutional on its face and refused to consider the question as to whether or not it was unconstitutional as construed and applied, relying upon a fictitious and colorless non-federal ground of procedure in conflict with other decisions of the Court of Criminal Appeals. This *so-called* non-federal ground is so intermingled with the federal question as to require the consideration therof on review by this Court.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there now are presented to this Court for review substantial federal questions as follows:

1. Is the ordinance in question unconstitutional and void on its face because it prohibits and makes illegal that which is inherently lawful, to wit, the business of peddling and selling within the city, in excess of the police power and thereby discriminating against that type of business, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Is the ordinance in question, as its terms are construed by the Texas courts so as to include distribution of literature in preaching the Gospel, unconstitutional and void on its face and as so construed and applied, because it expressly prohibits absolutely the exercise of the rights of freedom of the press and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution?

3. Does Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly deny petitioner his right to the inalienable and inherent writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

4. Did the Court of Criminal Appeals of Texas err in affirming the judgment of the trial court, remanding petitioner to custody of respondent?

C

Reasons Relied on for Allowance of Writ

This petition for writ of certiorari should be granted in sound discretion of this Court because the Court of Criminal Appeals and the trial court have decided important questions of constitutional law in a manner not applicable to and in conflict with decisions of this Court in the cases of *Schneider* v. *State,* 308 U. S. 147, and *Hague* v. *C.I.O.,* 307 U. S. 496, 501, 518. The ordinance in question is unconstitutional because it is an outright prohibition of the right to distribute literature containing information and opinion.

It is to be noticed that in the cases of *Ex parte Slawson,* 141 S. W. 2d 609, 610, *Ex parte Lewis,* 147 S. W. 2d 478, *Ex parte Jones,* 81 S. W. 2d 706 and *Ex parte Spelce,* 119 S. W. 2d 1033, 1037, that the Court of Criminal Appeals did not hold that it did not have jurisdiction. On the contrary, the matter of the contentions advanced were discussed and the cases were decided on their merits, and judgments were entered, disposing of the cases on their merits. The judgment here entered disposed of the case on the merits and not on jurisdictional grounds, therefore the entire discussion of the opinion to the effect that the court does not have jurisdiction is immaterial since the

judgments of the trial courts were affirmed holding that petitioner was not denied his liberty in violation of the Constitution.

The questions presented as to the validity of the ordinance in question and the right to the writ of habeas corpus are of national importance and seriously affect the fundamental civil and personal rights of every person in the United States. The Court of Criminal Appeals of Texas has so far departed from the accepted and usual course of judicial procedure and decided an important federal question in an arbitrary and evasive manner as to call for the exercise of this Court's power of supervision to halt the same.

As further reasons why this petition for writ of certiorari should be granted, we refer to petition for writ of certiorari in the *Hilley** and *Largent* cases and to the entire dissenting opinion of Judge Graves of the Court of Criminal Appeals in the companion *Largent* case, and make the same a part hereof as though copied at length herein. (R. 9) See the Record in the *Largent* case, pages 28-35.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Court of Criminal Appeals of Texas directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the said court affirming the judgment of the trial court be reversed and the judgment of the trial court be reversed and that

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* The non-federal question involved in these three cases is best discussed in the *Hilley* case.

your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

TULLY B. KILLAM,

Petitioner

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn, New York

Attorney for Petitioner

SUPPORTING BRIEF

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

The Court of Criminal Appeals of Texas committed fundamental error in affirming the judgment of the trial court because

1) The ordinance in question is unconstitutional and void on its face because it prohibits and makes illegal that which is inherently lawful, to wit, the business of peddling and selling within the city, in excess of the police power and thereby discriminating against that type of business, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

2) The ordinance in question, as its terms are construed by the Texas Courts so as to include distribution of literature in preaching the Gospel, is unconstitutional and void on its face and as so construed and applied, because it expressly prohibits absolutely the exercise of the rights of freedom of the press and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

3) Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly denies petitioner of his right to the inalienable and inherent writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

The points presented under the above specifications are related and will be argued together.

It is to be noticed that this ordinance prohibits absolutely and makes unlawful peddling any kind of merchandise on the public square or on any street within the corporate limits of the city of Floresville. (R) This prohibition is unconstitutional, even when applied to peddling of ordinary articles of merchandise. See case of *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504, and other cases cited, pages 18-19, infra, this brief.

The Texas courts have construed this ordinance so as to include the distribution of literature containing information and opinion. As so construed it expressly makes unlawful and thereby prohibits the distribution of literature containing information and opinion within the corporate limits of Floresville. This ordinance, therefore, as so construed, on its face is unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution and is identical with the ordinances knocked down by this Court in Numbers 13, 18 and 29, October Term 1939, in the case of *Schneider* v. *State,* 308 U. S. 147.

The questions presented on this application concern the invalidity of this law expressly, directly and properly presented to the Court of Criminal Appeals in the time and in the manner acceptable to the procedure of Texas.[6]

Furthermore the constitutionality of this ordinance was adequately and sufficiently presented to the County Court and to the Court of Criminal Appeals in the application for writ of habeas corpus. (R. 4, 10-12, 15, 16) See *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 66-69, 71.

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[6] *City of Amarillo* v. *Tutor,* 267 S. W. 697, 199 S. W. 352; *Hoffman* v. *State,* 20 S. W. 2d 1057; *Burnes* v. *State,* 75 Tex. Cr. Rep. 188, 170 S. W. 550, *Gohlman,* etc. v. *Whittle,* 273 S. W. 808. Texas Jur., Vol. 9, page 469.

Attention is called to the fact that under the procedure of Texas it is unnecessary to attack by express allegations the validity of a law in the application for habeas corpus. (See cases footnote 2, supra.) The allegation that one is illegally restrained of his liberty is sufficient to raise any constitutional question, because the constitutionality of a law is a *fundamental question* that can be raised at any time, without allegation of unconstitutionality in petition, oftentimes is considered by the Court of Criminal Appeals even when raised for the first time before that Court.[7] The Court of Criminal Appeals holds that the general allegation of "illegally restrained of liberty" contained in application for writ of habeas corpus authorizes a proceeding inquiring into any ground that would show the restraint to be illegal or the judgment under which the petitioner is held to be void.[8] Furthermore, a constitutional question is considered properly raised when presented at any time, even as late as the motion for rehearing. See cases cited, footnote 6, p. 15, supra.

This matter has been fully discussed in the petition for writ of certiorari filed in *Hilley* v. *Spivey* (companion case filed with this Court), and discussion contained in such petition will not be repeated here but is referred to and made a part hereof as though copied at length herein. The Court is requested to read and consider the same in connection with this question. See pages 11-16, 23-33, *Hilley* petition for writ of certiorari.

The holding of the Court of Criminal Appeals in denying the right to review petitioner's appeal concerning the application for writ of habeas corpus is fictitious and colorless and without foundation and conflicts with the prior decisions of that court in *Ex parte Faulkner,* 158 S. W.

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[7] See footnote 2, p. 5, supra.

[8] See footnote 2, page 5, supra; and *Ex parte Calhoun,* 91 S. W. 2d 1047; *McCormick* v. *Sheppard,* 86 S. W. 2d 213; *Ex parte Cox,* 53 Tex. C. R. 240, 101 S. W. 369; *Ex parte Mato,* 19 T. C. R. 112; *Ex parte Cain,* 56 Tex. C. R. 538, 120 S. W. 999; *Ex parte Walsh,* 59 Tex. C. R. 409, 129 S. W. 118.

2d 525; *Ex parte J. D. Carter* (one of Jehovah's witnesses in one of the companion cases argued with this case when this matter was submitted to the Court of Criminal Appeals), 156 S. W. 2d 986.[9]

In this, as well as companion cases of *Ex parte Largent* and *Ex parte Hilley* in the Court of Criminal Appeals (also brought to this Court as companion cases on petitions for writs of certiorari) it is significant that the Court of Criminal Appeals did not dismiss the appeal for want of jurisdiction, as it would have done under the prevailing practice, had that court seriously believed that it did not have jurisdiction. If an appellate court does not have jurisdiction, as contended by the Court of Criminal Appeals, it would be obligated to sustain the motion to dismiss the appeal made by the State's Attorney in these cases. On the contrary, that court ignored the motion to dismiss made by the State's Attorney and affirmed the judgments of the trial courts in the three cases, remanding the petitioners to custody, thereby showing that the Court of Criminal Appeals considered the cases on the merits and that the *so-called* non-federal question is absolutely colorless and fictitious. The trial courts decided the cases on the merits and held the ordinances constitutional and found petitioners had not been denied their constitutional rights. The Court of Criminal Appeals affirmed the holding of the trial courts, thereby it cannot be said that the disposition made of these three cases is based on an adequate non-federal question.

The Court of Criminal Appeals admittedly holds that it has the power to review the order appealed from if the ordinance is unconstitutional on its face. This necessarily intermingles the *so-called* non-federal question with the federal question so as to require consideration by this Court. Regardless of how the ordinance was construed by

[9] See also *Ex parte Roquemore*, 131 S. W. 1101, *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011; *Ex parte Lewis*, 45 Tex. C. R. 1, 73 S. W. 811; *Ex parte Lewis*, 147 S. W. 2d 478; *Ex parte Baker*, 78 S. W. 2d 610; *Ex parte Spelce*, 119 S. W. 2d 1033, 1037; *Ex parte Slawson*, 141 S. W. 2d 609, 610, and *Ex parte Jones*, 81 S. W. 2d 706.

the court below, it is nevertheless unconstitutional on its face and by its express terms, because it prohibits the innocent and legal business of peddling or selling from house to house or upon the streets. The holding here conflicts with *Ex parte Faulkner,* 158 S. W. 2d 525. This type of law is beyond the police power. This ordinance does not attempt to regulate the business of peddling or selling from house to house, but is an outright prohibition thereof, and such is therefore illegal and unconstitutional and in direct violation of the due process and equal protection clauses of the Fourteenth Amendment.

In *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504, this Court held invalid a Nebraska statute which involved an unreasonable restriction through the bread weight law, and said:

> "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Peddling and selling from house to house can never be held as a public nuisance and therefore cannot be prohibited as a crime. 3 *McQuillen on Municipal Corporations,* 2d ed., p. 122.[10] *Ex parte Faulkner,* supra.

[10] See also *Ex parte Baker,* supra; *Ex parte Patterson,* supra; *Orangeburg* v. *Farmer,* 181 S. C. 143, 186 S. E. 785; *Prior* v. *White,* 180 S. 347, 116 A. L. R. 1176; *Ex parte Harris,* 97 Tex. C. R. 399, 261 S. W. 1050; *Real Silk Hosiery Mills* v. *Richmond* (Calif.), 298 F. 126; *Jewel Tea Co.* v. *Town of Bel Air,* 172 Md. 536, 192 A. 417; *White* v. *Town of Culpeper,* 172 Va. 630, 1 S. E. 2d 269; *Jewel Tea Co.* v. *City of Geneva* (Nebr.), 291 N. W. 644; *De Berry* (one of Jehovah's witnesses) v. *City of LaGrange* (Ga.), 8 S. E. 2d 147; *Ex parte Maynard,* 275 S. W. 1071; *City of Columbia* v. *Alexander,* 119 S. E. 241, 32 A. L. R. 746; *City of McAlester* v. *Grand Union Tea Co.,* 98 P. 2d 924; *Commonwealth of Pennsylvania* v. *Myers* (one of Jehovah's witnesses), Opinion by Centre County Court of Quarter Sessions, Jan. 24, 1940; *Chisholm* v. *Shook* (one of Jehovah's witnesses), Opinion by Minnesota 11th Judicial Dist. Court, St. Louis County, Jan. 27, 1940; *New Jersey Good Humor, Inc.* v. *Board of Comm.* 11 A. 2d 113, 114; *George* v. *City of San Francisco,* 235 F. 757, 779; *Humes* v. *City of Little Rock,* 138 F. 929; *Yates* v. *Milwaukee,* 10 Wall. 497; *Yee Gee* v. *City and Co. of San Francisco,* 235 F. 757; *Shreveport* v. *Teague,* 8 S. 2d 640.

Because the matter is *exactly in point,* we here call attention to the case of *Ex parte Walrod,* 120 P. 2d 783, an original habeas corpus action—decided by the Criminal Court of Appeals of Oklahoma Dec. 23, 1941, where that court had before it for review the case of one of Jehovah's witnesses who had been unlawfully imprisoned and restrained of his liberty in the city jail of Stillwater, Oklahoma, for the alleged violation of Ordinance No. 611 of that city, holding unlawful the distribution of literature "on the streets and sidewalks of the congested business district of the City of Stillwater, Oklahoma, and said congested business district is defined as being the territory included from Fifth avenue to Eleventh avenue and between Hudson Street and Lewis Street." There the Criminal Court of Appeals, in discharging petitioner, held the ordinance to be unconstitutional and void under the First and Fourteenth Amendments to the Constitution of the United States because such ordinance denied the rights of freedom of the press, speech and worship, being a prohibition of and direct burden on such rights.

See also *Ex parte Winnett et al.,* 121 P. 2d 312, also an original habeas corpus action decided by the Criminal Court of Appeals of Oklahoma on January 7, 1942, where four of Jehovah's witnesses were restrained of their liberty in the city jail of Shawnee, Oklahoma, for the alleged violation of an ordinance of that city prohibiting the distribution of literature of any kind at any time on the streets of the city of Shawnee. Here the Criminal Court of Appeals likewise rightly found such ordinance unconstitutional and void, being an outright denial of freedom of speech, press and worship guaranteed by the Constitution of the United States and discharged petitioners.

This type of ordinance is admittedly in excess of the police power expressly and is condemned in *Schneider* v. *State,* supra. Even the majority opinion in *Jones* v. *City of Opelika,* Nos. 280, 314 and 966, October Term 1941, 62 S. Ct. 1231, written by Mr. Justice Reed, states that this sort of law is invalid: "Ordinances absolutely prohibit-

ing the exercise of this right to disseminate information are, a fortiori, invalid." See also *Hague* v. *C.I.O.*, 370 U. S. 496, 501, 518.

What is here done by the Court of Criminal Appeals and the County Court of Wilson County in construing the terms of this ordinance to be valid and to include the distribution of literature containing information and opinion has for its basis the same reasoning that was employed by this Court in the majority opinion in *Jones* v. *City of Opelika*, supra. The courts below in this case hold that one who "sells" literature can be dubbed and falsely labeled as a "peddler" or "salesman" of "merchandise" and thereby be denied his constitutional rights. The courts below admit that an ordinance is invalid on its face when expressly prohibiting the distribution of literature but when an ordinance prohibiting peddling is wrongly construed and applied to one engaged in distributing literature it is valid.* *This is a distinction, without a difference.* The ordinance here on its face and as its terms are construed by the courts below expressly prohibits absolutely the exercise of fundamental personal rights within the jurisdiction of the city of Floresville.

If the Court finds that this ordinance is unconstitutional on its face and as its terms have been construed, then, a fortiori, according to the admission of the Court of Criminal Appeals, that Court should have considered the application for writ of habeas corpus.

If the holding of the Court of Criminal Appeals be sustained, then an increased burden of appeals to this Court is necessary in cases involving Jehovah's witnesses from the 254 counties of Texas, because of the action of the Court of Criminal Appeals in attempting to escape and avoid its responsibility under the Constitutions of Texas and the United States, to protect rights secured by the United States Constitution to its citizens in Texas.

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* The non-federal question involved in these three cases is best discussed in the *Hilley* case.

The ordinance is clearly invalid on its face, and for this reason the judgment of the Court of Criminal Appeals should be reversed.

If the argument presented herein (together with that presented in the companion cases of *Hilley* v. *Spivey* and *Largent* v. *Reeves*) is given thoughtful consideration by the Court, the conclusion will be inescapable that this Court has jurisdiction and that the petition for certiorari should be granted and the judgment and decision of the Court of Criminal Appeals should be set aside and held for nought.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) and Rule 38, par. 5, of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of committed by, and the judgments rendered by, the Court of Criminal Appeals and the trial courts, against petitioner.

Respectfully submitted,

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